Memo

To: The U.S. Environmental Protection Agency

From: Richard Kinch

Date: April 26, 2018

Re: Comments regarding EPA's proposed amendments to the CCR Rule

Having worked at EPA and been involved in the development of the 2015 CCR Rule, I have comments regarding how EPA approached the proposed amendments. These comments are as much about general regulatory development processes as they are about the CCR proposed amendments. I hope those at EPA receive these comments with the positive intent they are given and recognize the opportunities for improvement. While there are some fundamental weaknesses in the Agencies approach, there are sound opportunities to make adjustments in issuing the final rule. The following comments identify the procedural weaknesses which EPA management should strive to avoid:

- For some of the proposed provisions EPA provides criteria without supporting data or analysis. In essence, EPA simply expresses an opinion as to an appropriate criterion. This action largely invites commenters to express alternative opinions, after which EPA can decide to do whatever it wants to do. To make for a sounder process, EPA should have initiated the effort to have criteria supported by data and analyses. For example, there is the reduced corrective action procedures, which are proposed to apply to actions completed in 180 days. There is no data or analyses presented from which 180 days is derived. Even if a commenter does what EPA failed to do and provides data and analyses to support an alternative timeframe, the public is deprived of being able to comment on a process that was more than an opinion.

  In the case of the 180 days, EPA could have gathered data on past corrective actions, the timeframe needed to complete action, and the severity of environmental release, to develop a basis for a timeframe criterion for reduced corrective action procedures. But, the concept of relying on rapid timeframe isn't necessarily the best structure for allowing reduced corrective action procedures – and it necessitates (if done appropriately) some data and analyses to justify the specific timeframe in the regulatory provision. Furthermore, even if a severe issue is addressed quickly, it may still warrant the full corrective action procedures. A more appropriate structure would be to apply the reduced corrective action procedures to circumstances which meet the following conditions:
    - There are no direct releases to groundwater from the unit which exceed the groundwater protection criteria of the CCR Rule;
    - The release of concern is limited to on-site property exceedances; and
    - There is no imminent dam failure concern.

  Note, the alternative direction presented above, removes the need for appropriate data and

analyses to support a specific timeframe (i.e., 180 days), and better focuses on the kinds of occurrences that warrant reduced corrective action procedures.

- In the 2015 CCR rule some flexibility was provided by allowing qualified professional engineers to provide certain certifications. Other areas of flexibility that were provided for municipal solid waste landfills were not enacted for CCR based on an apparent thought that such additional flexibility needed statutory authority for State Approved CCR Programs. With the WIIN Act, the statutory authority for State programs is now in place. The basic objective, however, should be to ensure that the flexibility, which EPA acknowledges is appropriate, is fully available. With States being slow to seek approval or simply not seeking approval, much of the industry may not actually have access to the proposed regulatory flexibility. The flaw in EPA's thinking with the 2015 CCR Rule and continuing with the proposed amendments is the logic behind States needing EPA approved CCR programs for EPA to enact regulatory flexibility.

  As the Agency allowed certification by a qualified professional engineer in certain circumstances, EPA needs to have some criteria for why States (without an EPA approved CCR program) cannot make similar types of certifications. In the original CCR Rule, it was never clear why certifications by qualified professional engineers was fine for some actions, and the denied flexibility could not be addressed by other certifications, including by States (without EPA approved CCR programs). Somehow a State that was approved to make a decision for a MSWLF is not capable of that same call for a coal fired utility is procedural nonsense. For items like issuing an alternative groundwater protection standard, EPA's Office of Water established programs for States to make such determinations. In the area of solid waste, the Office has been supportive of such State Decisions in line with the Agency's Comprehensive State Ground Water Protection Program Guidance. A State certification, like the certification of a qualified professional engineer, does not become sounder because the decision is executed on a different piece of paper – a certification versus an EPA approved State CCR program permit. The fallacy is further illustrated by how the Oklahoma program approval would function. The State requirements incorporate the CCR Rule by reference, but program approval occurred prior to the upcoming changes – still EPA somehow would allow Oklahoma the ability to make various decisions in the future for which their CCR program was not specifically evaluated. There needs to be consistent criteria for how regulatory flexibility is provided. The threshold question should be whether there is a need for the regulatory flexibility – be that better environmental protection or equivalent protection in a more cost-effective manner. Then there is the task of identifying parties that can be trusted to make a sound decision. For the 2015 CCR Rule EPA's limited flexibility was confined to qualified professional engineers, and now the proposal looks for expanded flexibility via EPA approved State CCR programs. With the slow nature of such approvals, and the number of states not seeking approval this will leave appropriate regulatory flexibility unavailable in many cases. There are States (without an EPA approved CCR program) and other entities such as qualified toxicologist that can provide appropriate certifications. In other circumstances, EPA has taken upon itself the burden of approving regulatory flexibility (i.e., in variance applications). Where there is an understood need and EPA does not want to assume the burden, the Agency should allow other qualified parties to make the necessary decisions. It is recognized that in some circumstances, EPA may not trust the nature of a decision in the hands of certain parties. However, it is wholly inappropriate to fail to trust States

(without an EPA approved CCR program) to make decisions that EPA trusts them to make in non-CCR specific circumstances.

- In earlier years at EPA, there was considerable travel to sites to gather data, and understand the operations that were about to be regulated. Over the years such activity has substantially dwindled, at least within certain programs. The proposed amendments with regard to the beneficial use of coal ash during closure appear to reflect the need for a much better understanding of closure designs. EPA management should aware of the level of experience and expertise pertaining to closure designs that supports the proposed provisions, what CCR closure operations were visited, what materials were assessed and contractor evaluations considered. For the proposed beneficial use of CCR during closure provision, the supporting data and analysis is not there, and opinion-based criteria not well formulated. Given the circumstances, trying to formulate a collection of specific criteria is fraught with problems, while a performance-based provision would be structurally more manageable. Fortunately, there is a sound performance-based solution for EPA. Admit that the beneficial use exclusion functions as the language states.

- The proposed amendments make an interpretation that the exclusion of beneficial use practices doesn't really apply. This appears to be an opinion without support and inconsistent with prior EPA actions. There are numerous circumstances where EPA has used language similar to the CCR Rule's provision on beneficial use: "This Subpart does not apply to practices meeting the definition of beneficial use of CCR." The "This Subpart does not apply..." language means what it says elsewhere. Very analogous circumstances occurred in the MSWLF rule which prohibited the addition of liquids. Later, EPA added a provision that said if the MSWLF meets the definition of a bioreactor, then the prohibition on liquids does not apply. For practices that meet the definition of a bioreactor, they can indeed add liquids, despite the prohibition of liquids in MSWLFs. In the case of CCR, there are provisions in the Subpart where the addition of CCR is prohibited. But, like bioreactors, there is the exclusion: "This Subpart does not apply to practices meeting the definition of beneficial use of CCR." This type of inconsistent and critically important opinion by EPA warrants reconsideration and significant disclosure.

Thank you for the opportunity to comment, and I hope my experiences and views help EPA's efforts in issuing a final rule.